

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2363-CR

Cir. Ct. No. 2013CF2326

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADORE A. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STEPHEN E. EHLKE, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Adore Thomas appeals a judgment of conviction for three counts of first-degree sexual assault by use of a dangerous weapon, one count of aggravated battery, and one count of strangulation and suffocation. Thomas contends that DNA and other evidence linking him to the crimes should

have been suppressed because in the search warrant affidavit police knowingly included a false statement and omitted material facts. For the reasons set forth below, we disagree. We affirm.

¶2 On August 29, 2013, police obtained a search warrant for Thomas's DNA. The affidavit in support of the search warrant set forth the following facts.

¶3 The female victim was attacked and sexually assaulted by an unknown assailant around 11:00 p.m. on August 4, 2013. Police recovered a bandana from the crime scene, which the assailant had used to gag the victim, and submitted the bandana for DNA testing. The victim provided a description of her assailant to a police sketch artist, who then created a sketch of the suspect. Police used the sketch to compile 30 photographs of potential suspects, including Thomas's brother, Armon Thomas (Armon), who resided near the site of the attack. Police displayed each of the 30 photographs to the victim, one at a time. When the victim viewed the photograph of Armon, the victim stated: "This looks *really* familiar. He looks a bit younger. I don't know how old the photo is, maybe it's an older photo."

¶4 Police obtained a search warrant for Armon's DNA, and made contact with Armon. Armon informed police that his younger brother, Adore Thomas, is often mistaken for Armon.¹ Armon also informed police that Adore had been staying at the same address with Armon for a few weeks, and said that Adore likes to walk alone at night. Police verified that Adore is similar to Armon in appearance.

¹ To avoid confusion, we now refer to the defendant as Adore.

¶5 Police executed the search warrant and obtained Adore’s DNA. The results of DNA testing indicated that Adore’s DNA matched the DNA found on the bandana left at the crime scene. Adore then confessed to the physical attack, but denied the sexual assault, claiming he intended only to rob the victim.

¶6 Adore moved to suppress the DNA and derivative evidence, arguing that the affidavit in support of the warrant contained a false statement by stating that Armon said that Adore “likes to walk alone at night,” and omitted the material information that the photograph of Armon was unduly suggestive within the array of photographs shown to the victim. The circuit court denied the suppression motion, and Adore was convicted at a jury trial. Adore appeals.

¶7 “A search warrant may issue only on probable cause.” *State v. Sveum*, 2010 WI 92, ¶24, 328 Wis. 2d 369, 787 N.W.2d 317. A court deciding whether to issue a search warrant must determine “whether, under the totality of the circumstances, given all the facts and circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* (internal quotation marks and quoted sources omitted).

¶8 If a defendant establishes that the search warrant affiant knowingly included a false statement, or omitted material information, the court must assess probable cause after the false statement is deleted and the omitted information included. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *State v. Mann*, 123 Wis. 2d 375, 388-89, 367 N.W.2d 209 (1985). We independently review whether an affidavit establishes probable cause after those corrections. *See State v. Manuel*, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

¶9 Adore contends that the affidavit contained the following false statement: “Armon stated his brother likes to walk alone at night.” Adore cites

the transcript of the police interview of Armon, in which Armon told police that, after recently arriving from Georgia, Adore had, by himself, “walked around a couple of times” and “walked around the neighborhood a little bit,” both in the daytime and at nighttime. Adore contends that the statement in the affidavit was false because Armon never said that Adore “likes to walk alone at night.” Adore argues that the statement in the affidavit implies that Adore frequently walked around by himself at night, while Armon’s true statement was that Adore walked around “a couple of times.” He contends that the statement in the affidavit, unlike Armon’s true statement, made Adore’s actions appear suspicious and created a likelihood that Adore encountered the victim due to the frequency of his walking around the neighborhood alone at night. Adore argues that the circuit court’s decision to deny the suppression motion was based on the court’s clearly erroneous factual finding that the statement in the affidavit was based on a summary of the police interview of Armon, taken from police notes. According to Adore, there was no testimony set forth by the State at the suppression hearing to support that speculation. Rather, Adore contends, the facts are undisputed that the statement in the affidavit was false and the State offered no evidence to show a reasonable explanation for why the false statement was included in the affidavit.

¶10 Adore also contends that the affidavit omitted the material information that the photograph of Armon shown to the victim was unduly suggestive in that it showed Armon sitting in front of a residence, wearing a hat, with his arms raised and fingers pointed at the sides of his face, while all of the other photographs were head shots or jail booking photographs. He contends that the victim’s identification of Armon was already weak, and that the police should have described in the affidavit that the photograph of Armon was different from the other 29 photographs in the array or should have attached the photographs to

the affidavit. Adore argues that the circuit court should have been informed that the photograph of Armon was different from the rest, weakening the reliability of the already tenuous identification, as part of the totality of the circumstances for the court to consider in its probable cause analysis. Adore contends that, if the warrant affidavit had described the suggestive photograph and had omitted the statement that Adore “likes to walk alone at night,” the affidavit would not have contained probable cause to support a search warrant for Adore’s DNA.

¶11 We conclude that, even if the affidavit had correctly summarized Armon’s reference to Adore’s walking and included the omitted information, it still would have established probable cause. *See State v. Ward*, 2000 WI 3, ¶27, 231 Wis. 2d 723, 604 N.W.2d 517 (probable cause for search warrant is established by “sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched” (internal quotation marks and quoted sources omitted)). After those changes, the affidavit would have set forth that the victim stated that the photograph of Armon (showing Armon sitting in front of a residence, wearing a hat, and pointing at the sides of his face) looked “really familiar,” in contrast to the other 29 photographs (which were all head shots or jail booking photographs). In addition, the affidavit would have set forth that Armon is similar in appearance to the police sketch of the suspect; that Adore resembles Armon in appearance; that Adore had been staying near the site of the crime in early August 2013; that Armon stated that Adore is often mistaken for Armon; and that Armon indicated that Adore had, by himself, “walked around a couple of times” and “walked around the neighborhood a little bit,” both in the daytime and at nighttime. Additionally, the affidavit would have set forth that the bandana used in the assault was recovered from the crime scene and was being tested for

DNA evidence. Had the victim's tentative identification of Armon been further weakened by the information that Armon's photograph was different from the other photographs shown to the victim, and if the affidavit had not indicated that Armon stated that Adore "liked" to walk alone at night, the affidavit would have still set forth a fair probability that evidence of a crime would be found in Adore's DNA. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

